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No. 82-91
IN THE

Supreme Court of the United States

October Term, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

vs.

PADUNGSRI PHINPATHYA,
Respondent.

BRIEF FOR THE RESPONDENT.

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Question Presented.

Whether respondent's three-month absence from the United States may be considered meaningfully interruptive of her "continuous physical presence" in this country, for the purpose of determining eligibility for suspension of deportation pursuant to 8 U.S.C. 1254(a)(1), even though the absence did not reduce the severity of the hardships associated with her deportation.

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BRIEF FOR THE RESPONDENT.

I.

THE ISSUE FOR WHICH CERTIORARI HAS BEEN GRANTED IS A MOOT ISSUE.

This Court has succinctly examined the mootness doctrine in *North Carolina v. Rice*, 404 U.S. 244, 246 (1971), wherein it stated:

> ". . . [R]esolution of the question [of mootness] is essential if federal courts are to function within their constitutional sphere of authority. Early in its history, this Court held that it had no power to issue advisory opinions, *Hayburn's Case*, 2 Dall. 409 (1792), as interpreted in *Muskrat v. United States*, 219 U.S. 346, 351-353 (1911), and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. *Oil Workers Unions v. Missouri*, 361 U.S. 363, 367 (1960). To be cognizable in a federal court, a suit 'must be definite and concrete, touching

> the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). However, '[m]oot questions require no answer.' *Missouri, Kansas & Texas R. Co. v. Ferris*, 179 U.S. 602, 606 (1900). Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions,' *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920), quoting *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308, 314 (1893); our impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n. 3 (1964).'' 404 U.S. at 246.

The Article III case or controversy concept requires that an actual controversy must be extant at all stages of appellate or certiorari review and not just when the action is initiated. For that reason, the issue of mootness can be raised at any time, even for the first time, at the Supreme Court level. *DeFunis v. Odegard*, 416 U.S. 312 (1974).

Review by this Court was sought by the Immigration and Naturalization Service of one issue only. The Immigration and Nauralization Service seeks review of the finding of the United States Court of Appeals for the Ninth Circuit that respondent has satisfied the seven years continuous physical presence requirement of the Immigration and Nationality Act, Section 244 (8 U.S.C. § 1254(a)(1)).

The Immigration and Nationality Act, Section 244 (8 U.S.C. § 1254(a)(1)) provides for application for suspension of deportation of a deportable alien who

> "[1] has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, . . . [2] proves that during all such period he was and is a person of good moral character; and [3] is a person whose deportation would, in the opinion of the Attorney General result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. . . ."

The Immigration Judge and the Court of Appeals both concluded that respondent satisfied the good moral character and extreme hardship requirements of 8 U.S.C. § 1254(a)(1), and the Immigration and Naturalization Service has not challenged those findings. Only respondent's fulfillment of the seven years continuous physical presence requirement is challenged.

As is clear from the record below, the issue focuses around whether respondent's departure in early 1974 was "meaningfully interruptive" of her continuous physical presence in the United States dating from October, 1969.

However, the factual circumstances of respondent's case have changed materially since the last administrative proceedings before the Board of Immigration Appeals. Respondent does not refute the fact that she last entered the United States on April 24, 1974, as that fact was established at her deportation hearing before Immigration Judge Robert T. Griffin on September 6, 1978. Consequently, the length of time which has lapsed since respondent's last entry into the United States is now a period in excess of eight years.

Since respondent can now unquestionably prove that she has been "physically present in the United States for a continuous period of not less than seven years", Immigration and Nationality Act, Section 244 (8 U.S.C.

§ 1254(a)(1)), and since the remaining two requirements for the relief of suspension of deportation have previously been found to exist by the immigration judge (*i.e.*, respondent's good moral character and extreme hardship to her United States citizen children), the undeniable conclusion is that respondent is statutorily eligible for the relief sought.

On February 3, 1983, based on the new and material fact that she has now satisfied the continuous physical presence requirement of 8 U.S.C. § 1254(a)(1) respondent moved the Board of Immigration Appeals to reopen her deportation proceedings in order that her application for suspension of deportation may be granted at this time. Such reopening is appropriate under 8 C.F.R. § 3.2,[1] since the relief of suspension of deportation is now "sought on the basis of

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[1]8 C.F.R. § 3.2 provides:

"The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. For the purpose of this section, any final decision made by the Commissioner prior to the effective date of the Act with respect to any case within the classes of cases enumerated in § 3.1(b)(1), (2), (3), (4), or (5) shall be regarded as a decision of the Board."

circumstances which have arisen subsequent to the hearing." 8 C.F.R. § 3.2.

Respondent's deportation can be suspended by the administrative agency notwithstanding any decision by this Court on the issue before it. Respondent, therefore, urges this Court to dismiss this action, as the issue of whether respondent's departure from the United States in 1974 was "meaningfully interruptive" of her earlier claimed seven years continuous physical presence is now a moot issue.

DeFunis v. Odegard, supra, involved the question of mootness in circumstances analogous to the instant case. DeFunis, a law school student had challenged the constitutionality of the law school's admission policy, and the trial court ordered him admitted to the school. On appeal, the Washington State Supreme Court reversed and DeFunis sought Certiorari in this Court. Pending determination by the Court, Mr. Justice Douglas stayed the judgment of the State Supreme Court with the result that DeFunis was in his last semester of law school when his case reached this Court. Additionally, the law school had made assurances that regardless of the outcome of the case in this Court, DeFunis would be allowed to finish law school.

The Court concluded that:

> "Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitation of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties." 416 U.S. at 320.

Such was the holding of this Court notwithstanding the suggestion by dissenting justices that any number of un-

expected events might preclude DeFunis' graduation at the scheduled time.

In Footnote 5 the Court stated:

> " 'But such speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide,' *Hall v. Beals*, 396 U.S. 45, 49 (1969), in the absence of 'evidence that this is a prospect of "immediacy and reality." ' *Golden v. Zwickler*, 394 U.S. 103, 109 (1969); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)".
>
> *DeFunis v. Odegard, supra*, at 320, note 5.

Since the deportation of respondent can be suspended "regardless of any decision this court might reach on the merits of this litigation", *DeFunis v. Odegard, supra*, at 319, respondent urges the Court to dismiss this action as moot.

II.

THE SUSPENSION OF DEPORTATION PROVISION MUST BE LIBERALLY CONSTRUED IN ORDER TO SATISFY ITS LEGISLATIVE PURPOSE AS AN EQUITABLE AND AMELIORATIVE REMEDY.

This action brings into question the Attorney General's interpretation of that provision in the Immigration and Nationality Act (8 U.S.C. §§ 1101 *et seq.*) which gives the Attorney General discretion to suspend an otherwise mandatory deportation of an alien and to adjust that alien's status

to that of a lawful permanent residence. Immigration and Nationality Act Section 244(a)(1) (8 U.S.C. § 1254(a)(1)).[2]

One of the three criteria for exercise of that discretion is that the alien "has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of [his] application." 8 U.S.C. § 1254(a)(1). At issue is whether such a criterion must be narrowly construed or whether a liberal construction is more consistent with Congressional intent.

In vetoing the Immigration and Nationality Act of 1952, in part because the criteria enumerated for suspension of deportation were more restrictive than those found in the predecessor law, President Harry S. Truman recognized the function of the discretion given the Attorney General to be to grant "relief from the letter of the law." In reaction to the restrictive nature of the remedy contained in the 1952 Act he stated, "This is most unfortunate, because the bill, in its other provisions, would impose harsher restrictions and greatly increase the number of cases deserving equitable relief." 98 Cong. Rec. 8225 (H. Doc. 520), President's Veto Message to Congress on June 25, 1952, explaining

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[2]Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. § 1254(a)(1) provides:

> "(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and —
>
> (a) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."

reasons for vetoing H.R. 5678. Thus, the executive branch of the federal government noted the equitable nature of the suspension of deportation provision and the appropriateness of a liberal construction of the provision in determining eligibility for such relief.

The Court of Appeals for the Ninth Circuit has also concluded, based on the purpose of the statute, that:

> "[i]n construing § 244 [8 U.S.C. § 1254(a)(1)] we are in an area in which strict construction is peculiarly inappropriate. The apparent purpose of the grant of discretion to the Attorney General is to enable that officer to ameliorate hardship and injustice which otherwise would result from a strict and technical application of the law. A strict and technical construction of the language in which this grant of discretion is couched could frustrate its purpose. A liberal construction would not open the door to suspension of deportation in cases of doubtful merit. It would simply tend to increase the scope of the Attorney General's review and thus his power to act in amelioration of hardship." *Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964) at 816.

Another circuit court of appeal further stated that since this Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (see discussion, *infra*) and the Ninth Circuit decision in *Wadman v. INS*, *supra*, the word "continuous" has not been subject to a "hard and fast construction." *McColvin v. INS*, 648 F.2d 935 (4th Cir. 1981) at 937.

The court in *McColvin* recognized the inappropriateness of a rigid construction:

> "The parties in the present case agree that the continuous physical presence requirement may be relaxed in an appropriate case. They differ, however, on the degree of relaxation that should be allowed and on whether this case is an appropriate one for such relaxation." 648 F.2d at 937.

In discussing the suspension of deportation statute, 8 U.S.C. § 1254(a)(1), in conjunction with 8 U.S.C. § 1101(a)(13) (see footnote 2, *supra*), the court stated in *Kamheangpatiyooth v. INS*, 597 F.2d 1253 (9th Cir. 1979):

> "Both sections therefore must be interpreted in light of the congressional purpose. Both sections are remedial, and hence are to be generously construed. More specifically, both sections are intended to relieve aliens of the harsh results, and of the unsuspected risks and unintended consequences, that would flow from a literal and rigid application of the provisions of the Act relating to expulsion and exclusion." 597 F.2d at 1256.

In addition to executive and judicial branch interpretations, the legislative history itself shows that Congress' intent in enacting the suspension of deportation statute was remedial in nature and meant to ameliorate the hardship of deportation:

> "It is the information of the committee that there are a number of worthy cases in which persons, deportable on technical grounds, have lived in the United States for many years, but have no close family ties so as to enable them to become eligible for discretionary relief. . . . It is only just that other persons in this category who have not been favored by the introduction of private bills should have their cases considered for relief." S. Rep. No. 1204, 80th Cong., 2d Sess. (1948).

And prior to the amendment of the Immigration and Nationality Act in 1948, which extended suspension of deportation to aliens who had seven or more years residence in the United States, "Immigration and Naturalization Service officials stated that the law was too stringent. . . ." S. Rep. No. 1515, 81st Cong., 2d Sess. (1950).

Also, as pointed out in the Ninth Circuit decision in *Kamheangpatiyooth v. INS, supra*, a liberal interpretation of the continuous physical presence requirement would not result in a reduction of the exceptional quality of the remedy.

> "A generous construction of the continuous presence requirement of § 244(a)(1) is also especially appropriate because it will not require relief to be granted where relief may be unwarranted. Indeed, a liberal construction will not require the granting of relief in any case; it will only allow the Attorney General to review the case on the merits and to decide whether in his discretion relief in fact would be warranted." 597 F.2d at 1256, footnote 3.

As petitioner has pointed out, prior to the enactment of the Immigration and Nationality Act of 1952 (8 U.S.C. §§ 1101 *et seq.*):

> ". . . the Senate Committee on the Judiciary noted that INS field officers had criticized the administrative interpretation of the 7-year residence provisions of the law. These provisions have been held applicable to an alien who has a total of 7 years' residence in the United States, although the alien has been out of the United States for as long as 2 years during the last 7 years. S. Rep. No. 1515, 81st Cong., 2d Sess. 602 (1950). Two years later, in an attempt to discontinue lax practices and discourage abuses (H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 31 (1952), Congress amended the suspension of deportation statute to require seven years' continuous *physical presence* in the United States. [footnote omitted]" (Pet. Br. 23-24).

It is possible for the 1952 Act to stem the abuses complained of above and yet maintain the integrity of the original ameliorative intent of Congress in enacting the suspension of deportation provision. Too narrow an interpretation of the continuous physical presence requirement would result

in an overbroad application, disqualifying aliens whose cases are worthy of "consideration for relief," S. Rep. No. 1204, 80th Cong., 2d Sess. (1948), and whose cases involve none of the abuses the new law was created to discourage.

A better interpretation of the physical presence requirement would mandate that the Attorney General use his discretion to investigate and evaluate the totality of circumstances to determine whether a departure is meaningfully interruptive of the required seven years physical presence. The very nature of this remedy, which was spawned in the pond of equity to provide protection from the harsh inflexibility of a predatory statute, leads to this conclusion.

The history and intent of the statute suggest that its application be based upon an evaluation of the circumstances of each case, rather than strict adherence to the letter of the law.

III.

RESPONDENT HAS DEMONSTRATED THAT HER DEPARTURE IN 1974 WAS NOT MEANINGFULLY INTERRUPTIVE OF HER SEVEN YEARS CONTINUOUS PHYSICAL PRESENCE UNDER THE TEST ANNOUNCED BY THIS COURT IN *ROSENBERG v. FLEUTI*.

A. The Test Adopted by This Court in *Rosenberg v. Fleuti* to Determine Whether a Departure Is "Meaningfully Interruptive" of Continuous Physical Presence Is a "Totality of Circumstances Test."

This Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) was decided in the context of Immigration and Nationality Act, Section 101(a)(13) (8 U.S.C. § 1101(a)(13)),[3]

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[3]Immigration and Nationality Act, Section 101(a)(13), 8 U.S.C. § 1101(a)(13) provides:

> "The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes

(footnote continued on following page)

to determine whether a lawful resident of the United States "intended" a departure from the United States. This Court held that the resident alien did not intend the departure unless he departed "in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." 374 U.S. at 462. Thus, the test laid down by this Court in *Fleuti*, was whether the resident *intended* his departure to be *meaningfully interruptive* of his permanent residence.

This Court detailed the analysis to be used in applying the "meaningfully interruptive" test in this manner:

> "One major factor relevant to whether such intent can be inferred is, of course, the length of time the alien is absent. Another is the purpose of the visit, for if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful. Still another is whether the alien has to procure any travel documents in order to make his trip, since the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country. Although the operation of these and other possible relevant factors remains to be developed 'by the gradual process of judicial inclusion and exclusion,' [citation omitted], we declare today simply that an innocent, casual, and brief excursion by a resident alien outside

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of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception."

> this country's borders may not have been 'intended' as a departure disruptive of his resident alien status. . . ." 374 U.S. at 462.

Since the decision of the United States Court of Appeals for the Ninth Circuit, in *Wadman v. INS, supra*, the principles laid down by this Court in *Rosenberg v. Fleuti, supra*, have been applied in determining whether the alien has met the continuous physical presence requirement of 8 U.S.C. § 1254(a)(1). In *Wadman*, the Ninth Circuit stated:

> "In our judgment the term 'continuous' is no more subject to a hard and fast construction than is the term 'intended'. The question is whether the interruption, viewed in balance with its consequences, can be said to have been a significant one under the guides laid down in *Fleuti*." 329 F.2d at 816.

The Ninth Circuit, in *Wadman*, held that the alien's five day vacation trip to Mexico could not be found, as a matter of law, to be "meaningfully interruptive" of an otherwise continuous seven and one-half years physical presence in the United States.

Therefore, the test to be applied since the *Wadman* decision in 1964 that the test to be applied to determine whether a departure breaks continuity of physical presence in the United States for purposes of 8 U.S.C. § 1254(a)(1) is whether the departure can be characterized as having been "meaningfully interruptive" of that presence.

Closer examination of the factors enumerated by this Court in *Fleuti* is required to understand the true thrust of this Court's formulation in that case.

1) length of time.

The *Fleuti* Court stated that the length of time the alien is absent is "one major factor" to be considered in determining whether he intended the departure to be "meaning-

fully interruptive". The Court did not state that any particular length of time was short enough to determine conclusively that the departure was not meaningfully interruptive, nor did it state any specific length of time from which it would conclude that the absence was meaningfully interruptive. The fact in the *Fleuti* case was that the alien had been absent from the United States for a period of only "about a couple of hours", 374 U.S. at 450. Therefore, in paraphrasing its "length of time" factor, the Court stated that Fleuti's absence was "brief".

2) purpose of the visit.

The Court identified the purpose of the trip as an important factor to be considered in determining the resident alien's intent to depart in a manner which would be regarded as meaningfully interruptive of his residence. ". . . [F]or if the purpose of leaving the country *is to accomplish some object which is itself contrary to some policy reflected in our immigration laws*, it would appear that the interruption of residence thereby occurring would possibly be regarded as meaningful." 374 U.S. at 462 [emphasis added]. This factor was paraphrased by the Court, perhaps unfortunately, as "innocent", and subsequent inferior courts have abandoned the true character of the "purpose of the visit" factor, and substituted the factor of whether the entire trip was innocent of any wrongdoing whatsoever.

This Court in *Fleuti* was concerned with whether the alien's absence was occasioned by the express desire of accomplishing some objective contrary to the immigration policy of the United States, for example, for the purpose of smuggling illegal aliens into the United States. By dropping the "purpose of the visit" language and focusing on the "innocent" paraphrase, subsequent courts have been preoccupied with determining whether the alien's actions,

from departure to return, were innocent of any breach of law or regulation. This is far afield from this Court's original statement of the "purpose of the visit" factor.

In *Fleuti*, the resident alien had apparently crossed the border into Mexico simply for the purpose of taking a trip. 374 U.S. at 463. The Court concluded that if, in fact, that was the purpose of his visit, and that it was also brief and casual, that he did not intend to interrupt his residence in the United States by his departure.

3) procurement of travel documents.

This Court identified this factor to be significant since the necessity of obtaining passports and visas "might well cause the alien to consider more fully the implications involved in his leaving the country." 374 U.S. at 462. This factor was paraphrased by the Court as "casual".

4) other possibly relevant factors.

The recognition by this Court that factors other than the three specifically listed above may be relevant to a determination of whether an absence is "meaningfully interruptive" in subsequent cases indicates that this Court was, in fact, stating a totality of circumstances test. This Court determined that in Fleuti's case, the relevant factors to be considered in determining his intention were those three specifically stated above. Further, the Court did not state that an absence would have to be "innocent, casual and brief" to indicate a lack of intent to depart, but rather, that considering the facts of Fleuti's case, such an absence could not be considered meaningfully interruptive. This Court perceptively realized and made it clear in its opinion, that in determining the intent of an individual, the entirety of the circumstances surrounding his action must be consid-

ered. To reduce the holding of *Rosenberg v. Fleuti* to a simple "innocent, casual and brief" dogma is to ignore the major thrust of that opinion.

B. The "Diminished Hardship" Factor Utilized by the United States Court of Appeals for the Ninth Circuit in *Kamheangpatiyooth v. INS* and Applied in Respondent's Case Is a Logical and Permissible Application of This Court's Decision in *Rosenberg v. Fleuti*.

As has been discussed, *supra*, the holding of this Court in *Rosenberg v. Fleuti, supra*, was not that the three factors found to be relevant in that case be rigidly applied to all subsequent cases. Rather, this Court held that the ultimate test is whether the departure can be ". . . regarded as meaningfully interruptive. . . ." 374 U.S. at 462.

In order to determine whether an absence is "meaningfully interruptive" for purposes of 8 U.S.C. § 1254(a)(1), it is important to identify the Congressional purpose in creating the seven years continuous physical presence requirement. The Ninth Circuit in *Kamheangpatiyooth v. INS*, 597 F.2d 1253 (9th Cir. 1979) explained:

> "It was Congress's judgment that presence of that length was likely to give rise to a sufficient commitment to this society through establishment of roots and development of plans and expectations for the future to justify an examination by the Attorney General of the circumstances of the particular case to determine whether deportation would be unduly harsh [footnote omitted]. Continuity in the prescribed period of physical presence was required because continuity is important to the legitimacy of the inference that extended presence is likely to make deportation harsh. Presence that is only intermittent suggests the alien has not become so attached to this country that the authorities

should consider suspending normal operation of the immigration laws on his behalf. . . . Conversely, interruptions that are brief and infrequent do not diminish the probability that deportation would occasion undue hardship. An alien who leaves the country briefly and for innocent reasons during the requisite seven years may be in no different position, realistically viewed, than an alien who has remained within the borders for an identical period." 597 F.2d at 1256, 1257.

The court continued:

"To effectuate the purposes underlying the continuous period requirement, and to realize Congress's desire (identified in *Fleuti*) to avoid exposing aliens to unexpected risks and unintended consequences, the Board must determine whether a particular absence during the seven-year period reduced the significance of the whole period as reflective of the hardship and unexpectedness of expulsion. An absence cannot be significant or meaningfully interruptive of the whole period if indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred. . . ." *Kamheangpatiyooth v. INS*, 597 F.2d at 1257.

The Ninth Circuit is not alone in suggesting the use of the "diminished hardship" factor in determining the significance of a departure during the required seven year period. In *Heitland v. INS*, 551 F.2d 495 (2nd Cir. 1977), the Second Circuit explained:

". . . deportation of an alien who had accumulated seven years of fragmented residence in the United States, interrupted by frequent or long absences abroad, would not be expected to work as much hardship upon him as might result if he had resided in this country for an unbroken seven-year period, since the latter might reduce the likelihood of his being able to estab-

> lish his home elsewhere. The statute surely was not designed to protect the wanderers or the rootless. Hence, Congress used the word 'continuous.' On the other hand, to deny a person the benefits of seven years' continuous residence because of one or two short interruptions might well defeat the purpose of § 244(a)(1), *since the hardship in such a case would not be substantially different from that where the presence has been uninterrupted.*" *Heitland v. INS*, *supra*, at 501 [emphasis added].

Thus, in determining whether an absence is "meaningfully interruptive" of an alien's seven years continuous physical presence, an important factor to consider under the *Fleuti* totality of circumstances test, is what effect the absence had on the significance of the entire period spent in the United States; whether the absence was of such a nature as to alleviate or lessen the urgency of availing the alien of the relief of suspension of deportation.

Petitioner argues that in considering the factor of "diminished hardship", the Ninth Circuit has collapsed the seven year continuous physical presence requirement into the extreme hardship requirement, thereby effectively writing the seven year requirement out of the statute. (Pet. Br. 27). Respondent urges that the Ninth Circuit has only identified the "diminished hardship" factor as being one of the factors to be taken into consideration in determining whether an absence is sufficiently significant to be "meaningfully interruptive" of an otherwise continuous physical presence. In this context, the factor applies only to the significance of the absence *vis a vis* the seven year presence, notwithstanding the fact that a showing of extreme hardship is a separate and distinct requirement of the relief of suspension of deportation.

If, by his absence, an alien significantly diminishes the hardship which would ensue upon expulsion after an otherwise unbroken seven year period, it would follow that the absence destroys the significance of the whole seven period and should be found meaningfully interruptive. Conversely, however, if by his absence, the alien in no way diminishes the hardship which he would suffer upon deportation after an otherwise continuous seven year physical presence in the United States, the absence cannot be considered meaningfully interruptive without thwarting the Congressional purpose behind 8 U.S.C. 1254(a)(1).

For example, if the alien departs to his home country or a third country and sets up housekeeping, or accepts employment, or establishes or renews familial or other social ties in that country, certainly it could be inferred that expulsion from the United States would not cause as extreme a hardship upon the alien as if he had made only a brief trip to a third country for the purpose of visiting a family member or seeing the sights of that country. This is so, since, by his own actions, the alien has *increased* "the likelihood of his being able to establish his home elsewhere." *Heitland v. INS, supra*, 551 F.2d at 501. If, however, the alien has not in any way taken action or manifested an intent to withdraw or supplant the roots he has established in this country, this factor should be considered in determining whether his absence has meaningfully interrupted his continuous presence in the United States.

In this context, the objective manifestations of the alien's intent to break the continuity of his presence in the United States by uprooting himself from the United States or establishing himself elsewhere are integral factors to be taken into consideration in a totality of circumstances test. These objective manifestations of intent are easily identifiable factual realities, not self-serving statements by the alien after

the fact regarding his intention in departing the United States. Objective manifestations include such factors as whether the alien left real and/or personal property in the United States; whether immediate family members remained in the United States; the purpose of the alien's trip outside the United States; the purpose of the alien's return to the United States; and actions taken by the alien outside the United States which would indicate an intention to remain abroad.

Without taking into consideration all of the relevant circumstances surrounding the absence of the alien, it would be impossible for an immigration judge, the Board of Immigration Appeals, or a reviewing court to determine whether or not a given departure is "meaningfully interruptive" of an alien's physical presence in the United States.

C. Examination of the Totality of Circumstances Surrounding Respondent's Departure in 1974 Establishes That Her Three Month Absence Was Not Meaningfully Interruptive of Her Otherwise Continuous Physical Presence in the United States Dating From October, 1969.

Respondent's absence was "brief" under the guidelines set by this Court in *Rosenberg v. Fleuti*. Having entered the United States in October, 1969, and remaining here continuously, respondent absented herself from the United States for a period of approximately three months, from January, 1974, to April, 1974. (J.A 17) This three month period, when viewed in perspective of the total time that respondent has spent in the United States, is de minimis and consequently, brief.

The Order to Show Cause was issued against respondent in January 1977. (J.A. 29) This would indicate that from the time respondent first entered the United States until the

time proceedings were commenced against her by the Immigration and Naturalization Service, a period of seven years and four months had lapsed, or equivalently, 88 months. Respondent was absent for a three month period out of a total period of 88 months, or approximately three percent of the total lapsed period. When viewed in this perspective, the three month period can certainly be considered to be "brief".

Further, as of the date of commencement of proceedings in this Court on July 16, 1982, the total time lapsed since respondent first entered the United States is a period of twelve years and nine months, *i.e.*, 153 months. The three month absence represents less than two percent of that total period.

Respondent's purpose in making the visit abroad was purely innocent. Respondent testified that she had returned to Thailand for the three month period to visit her sick mother. (J.A. 17) The purpose of such a trip certainly was not to "accomplish some object which is itself contrary to some policy reflected in our immigration laws." *Rosenberg v. Fleuti*, 374 U.S. at 462.

Petitioner states in its Petition for a Writ of Certiorari, that although the Ninth Circuit recognized that the trip was for the purpose of visiting the sick mother, that there was no evidence in the record that respondent's mother was actually sick at the time of the trip, or that her mother's illness was the reason that respondent traveled to Thailand. (Petition, p. 7, note 5).

Assuming, *arguendo*, that respondent's trip was not for the purpose of visiting her sick mother, petitioner nonetheless does not suggest that the trip was for any illegal purpose, or for any purpose contrary to the United States immigration policy. Even if the trip was purely a social visit to see friends

and relatives in Thailand, a visit for such purpose is not counter to any United States immigration policy. Petitioner does not suggest that respondent departed the United States in order to smuggle illegal aliens or to accomplish any other unlawful purpose.

The third factor specifically mentioned in *Fleuti* is whether travel documents had to be obtained prior to the trip. This factor, though relevant to the issue of whether a legal permanent resident "intended" a departure under 8 U.S.C. § 1101(a)(13), is of questionable relevance when the issue is whether the circumstances surrounding a departure indicate whether that departure is "meaningfully interruptive" of a seven years continuous physical presence under 8 U.S.C. § 1254(a)(1). This is so, as the two statutes generally effect individuals in entirely different circumstances. 8 U.S.C. § 1101(a)(13), by definition, addresses itself only to aliens who are legal permanent residents of the United States. By contrast, 8 U.S.C. § 1254(a)(1) is almost always applied to aliens who have not been admitted for permanent residence and usually to individuals who have overstayed a visa or even entered the United States without a visa altogether. Indeed the relief is available only to aliens who have been found to be deportable from the United States. Since the issue under 8 U.S.C. § 1254(a)(1) is not whether the departure was "intended" but, rather, what the effect of the departure is on the overall significance of an otherwise uninterrupted seven years physical presence, the issue of the necessity of obtaining travel documents does not aid in the analysis. There is no question that respondent "intended" her departure; the issue is the relevance of that departure to her continuous physical presence in the United States.

An additional factor identified by the Ninth Circuit in *Kamheangpatiyooth* and the Second Circuit in *Heitland* as

being relevant to the significance of a departure under 8 U.S.C. § 1254(a)(1), and discussed *supra*, is whether the hardship to be suffered upon deportation has been diminished by the alien's absence from the United States. As discussed above, this factor is relevant to an understanding and evaluation of the totality of circumstances surrounding the absence, an issue completely independent of whether extreme hardship can be proven as is also required by 8 U.S.C. § 1254(a)(1).

Respondent, by her three month absence, in no way diminished the hardship which she or her United States citizen children would suffer if she were to be deported from the United States. She took no action, nor did she manifest any intention to disentangle herself from roots established in the United States or to re-establish her roots abroad. She did not liquidate her household in the United States and establish a new one abroad; in fact she left real estate and most of her personal belongings in the United States. Respondent did not take up employment abroad, nor did she acquire property. She left her husband in the United States in order that she could take a brief trip to Thailand to visit her ailing mother and at all times intended to return to the United States to be reunited with him. (JA 17-19) By her three month trip to Thailand, respondent in no way increased the likelihood that she could establish a new home abroad without suffering the extreme hardship which 8 U.S.C. § 1254(a)(1) was enacted to ameliorate.

Thus, the totality of the circumstances surrounding respondent's three month absence from the United States indicates that respondent's absence was not sufficiently significant to be "meaningfully interruptive" of an otherwise seven years continuous physical presence in the United States.

IV.
CONCLUSION.

Not only for the benefit of respondent, but also to ensure the integrity and utility of the law as intended by Congress and interpreted by the courts, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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